Supreme Court, U.S.
FILED

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(1)

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOSEPH PINSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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43 pp

QUESTION PRESENTED FOR REVIEW

Whether the use by the police of a Forward Looking Infrared Device (FLIR) to monitor conduct within one's home requires a search warrant under the Fourth Amendment of the United States Constitution.

PARTIES

The Parties are:

JOSEPH PINSON, Petitioner, and

The UNITED STATES OF AMERICA, Respondent.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Appendix Exhibit A) entitled *United States v. Joseph Pinson* is reported at 24 F.3d 1056 (8th Cir. 1994). Appellant's petition for rehearing was denied on June 21, 1994.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), which allows review by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. On May 23, 1994, the Eighth Circuit Court of Appeals entered its judgment affirming the conviction and sentence in this case, and a petition for rehearing was denied on June 21, 1994. This Petition is made in

connection with that decision, *United States v. Joseph Pinson*, 24 F.3d 1056 (8th Cir. 1994).

UNITED STATES CONSTITUTION AMENDMENT CITED:

Fourth Amendment — The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF FACTS

On July 25, 1991, at approximately 1:20 a.m., law enforcement authorities conducted an aerial surveillance of Petitioner's home and used a forward looking infrared device (FLIR) to detect heat emanating from the home. After detecting what authorities considered to be an excessive amount of heat, agents obtained a federal search warrant for the home on July 30, 1991. Among the items seized were marijuana plants, marijuana seeds, and various papers belonging to the Petitioner. Crucial to the Magistrate's determination of probable cause was information contained in the search warrant affidavit that resulted from the use of the forward looking infrared device, or what is more commonly referred to as a FLIR.

On December 13, 1991, a one-count indictment was filed against Petitioner and his roommate, Gail Adams, charging them with the manufacture of over 150 marijuana plants. On December 17, 1991, Petitioner pled not guilty and was released on bail. He remained free on bail pending resolution of the charges in the U.S. District Court for the Eastern District of Missouri.

On May 5, 1992, a superseding indictment was filed, and Petitioner and his co-defendant were charged with two counts, manufacturing over 100 marijuana plants, and possession of marijuana with the intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B).

Petitioner filed various pre-trial motions, including his motion to suppress the fruits of the search warrant. On September 17, 1992, after a hearing, Petitioner's motion to suppress was denied. Objections to the September 17 order were timely filed, and on October 14, 1992, Petitioner's objections were overruled.

Trial began on April 19, 1993. The jury's verdict was returned on April 21, 1993. Petitioner was found guilty of the manufacture of over 100 marijuana plants, and was found not guilty of possession of marijuana with the intent to distribute. Gail Adams, Petitioner's co-defendant, was found not guilty on both counts.

Petitioner appealed the jury's guilty verdict, and claimed that the District Court erred in not suppressing the fruits of the search. Specifically, Petitioner argued that the government's surveillance of activities inside his residence with the electronic device known as a forward looking infrared device (FLIR) constituted an illegal search in violation of his Fourth Amendment rights. Petitioner further argued that without this illegally obtained evidence, the affidavit supporting the search warrant lacked probable cause. [Petitioner also challenged the District Court's refusal to consider a downward departure under the "lesser harms" exception of U.S.S.G. §5K2.11 without a motion by the government, as Petitioner always contended that he grew the marijuana solely for his personal use for homeopathic medical reasons. The jury found him not guilty of possession with the intent to distribute.[1]]

The Eighth Circuit Court of Appeals affirmed the judgment of conviction and sentence. *United States v. Pinson*, 24 F.3d 1056 (8th Cir. 1994). It is from this ruling that this Petition for Writ of Certiorari arises.

---

[1] The lesser harms exception and its argument are not part of this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

IN THE FIRST REPORTED APPELLATE CASE ON THIS ISSUE, THE EIGHTH CIRCUIT COURT OF APPEALS MISCONSTRUED THE PRIOR RULINGS OF THIS COURT (AND SEVERAL LOWER COURTS) AND HELD THAT THE WARRANTLESS SEARCH OF PETITIONER'S RESIDENCE WITH A FLIR DID NOT REQUIRE A SEARCH WARRANT.

In its decision of May 23, 1994, the Eighth Circuit has misconstrued *Katz v. United States*, 389 U.S. 347 (1967), and held that the use of a forward looking infrared device (FLIR) to detect heat emanating from a source within one's home without a warrant does not constitute an unreasonable search and seizure in violation of the Fourth Amendment. *Katz, supra,* requires two elements to show such a violation, 1) a subjective expectation of privacy in the object of the challenged search, and 2) whether society is willing to recognize that subjective expectation as reasonable. The Appellate Court rightfully found that Petitioner did manifest a subjective expectation of privacy by covering his windows and closing off all visual access to his residence. However, the Appellate Court erred when it found that Petitioner did not have a reasonable expectation of privacy that society would be willing to recognize in the heat that was radiating from a source within his house into the surrounding airspace. The Appellate Court's error in this regard was predictable in that they wrongly focused on the airspace surrounding the home rather than the activity that was occurring inside the home. They also wrongly found that Petitioner had willfully vented "waste heat" when there were no facts in the record to support this conclusion.

The real question was, Did Petitioner have an expectation of privacy that society would be willing to recognize as to what was occurring within his house? To this question, the answer should be "Yes." A FLIR does more than just measure the temperature

of surrounding airspace. It measures heat emanating from particular locations, in this case, a person's home.

The only value of the so-called "waste heat" is in what it discloses about the interior of the home. The FLIR produces an image of the interior of the house that otherwise is protected by the house's walls. In this sense, the infrared thermal device allows the government to intrude into the Petitioner's home and gather information about what occurs there, just as if it could look inside using x-rays or other such technology. A person has a reasonable expectation of privacy in what occurs within a dwelling, and this Court has repeatedly stressed the need to safeguard the sanctity of one's home from unwanted government intrusions. *Payton v. New York*, 455 U.S. 573 (1980). Considering that the location intruded upon in this case was a dwelling, Petitioner submits that society is prepared to recognize his expectation of privacy as reasonable.

The Appellate Court itself stated, on page 2 of its decision, that "the FLIR observation revealed that the covered window on the third floor displayed an excessive amount of heat as did the roof and a skylight of the residence." The window, the roof, and the skylight were not on fire, therefore the heat they revealed was heat from within the house. In other words, the FLIR revealed what was going on inside the house, just as if the police had used an x-ray to look through the walls. Surely no reasonable court would conclude that an x-ray inspection of one's home by the police was objectively reasonable, and the facts in this case amount to the same type of an invasion of privacy.

The Eighth Circuit Court of Appeals' conclusion in this respect was contrary to other courts' decisions. For example, in *U.S. v. Ishmael*, 843 F.Supp. 205 (E.D. Tex. 1994), the Court stated on page 212,

> Based on the conclusions that 1) the defendants demonstrated a subjective expectation of privacy, 2) that the

> property in question is a business premises, not open to the public, and 3) that the thermal images were not the product of naked eye aerial observation, the Court finds that the Defendants had a reasonable expectation of privacy in the building and the surrounding property.

The Court in *Ishmael* stated that once this expectation of privacy had been shown, the burden shifts to the government to show that thermal imaging searches fall within an exception to the warrant requirement, and that the exception was reasonable. The Court further found that the thermal imaging equipment used by the government was exactly the type of sophisticated technology that concerned the Supreme Court, and was therefore excepted from the warrantless searches authorized by *Dow Chemical Co. v. United States*, 476 U.S. 227, 106 S.Ct 1819, 90 L.Ed.2d 226 (1986). Based on this reasoning, the Court concluded that, "The thermal imaging tapes made by officers trespassing on private land using hand held equipment offend the Fourth Amendment . . ."

In *U.S. v. Penny-Feeney*, 773 F.Supp. 220 (D. Haw. 1991), a case relied upon by the Appellate Court here, the District Court analogized the heat escaping from a building to abandoned garbage. The *Ishmael* Court recognized the flaw in this logic and stated:

> I am not persuaded that heat escaping from a building is the same as abandoned garbage. If the government has the right to repeatedly trespass, conduct visual searches from nearby open fields not protected as curtilage, and make frequent flyovers using FLIR and other advanced technology, all without a warrant, there is precious little left of the right to privacy. ... However, to use high tech sensory devices to detect such heat creates a situation inapposite to abandoned garbage. The Court therefore rejects the Government's argument that the defendants abandoned

their expectation of privacy by "allowing" the heat to radiate from the building and the air exhaust duct.

The *Ishmael* Court further answered the flawed analogy used by the Eighth Circuit between a FLIR and canine sniffs. First, thermal imaging cannot distinguish between "contraband" heat and heat arising from legal activities, so that information gathered from such a technique is far broader and therefore results in more intrusion than a canine sniff. Second, a dog's sense of smell, while more acute than a human's sense of smell, does not compare to a technology that can "turn minute gradations in temperature into video tapes from 1500 feet away."

Another case contrary to the Eighth Circuit's ruling in this case is *State of Washington v. Young*, 867 P.2d 593 (Wash. 1994). At page 599, the Supreme Court of Washington accurately held:

> In *Katz*, the defendant's telephone conversation from a public telephone booth was recorded by the police. The Court held this constituted a search under the Fourth Amendment because the defendant legitimately expected privacy during the telephone call. The Court said the "fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance." *Katz*, 389 U.S. at 353, 88 S.Ct. at 512. Likewise, in this case, the thermal detection unit did not send any rays or beams into the home, but nevertheless pierced through the walls of the home.

The Supreme Court further stated, and rightly so, that:

> The infrared device invaded the home in the sense the device was able to gather information about the interior of the defendant's home that could not be obtained by naked eye observations. Without the infrared device, the only way the police could have acquired the same information was to

> go inside the home. Just because technology now allows this information to be gained without stepping inside the physical structure, it does not mean the home has not been invaded . . .

Thus, the Supreme Court in *Young* therefore found the reasoning of the Court in *Penny-Feeney* unpersuasive, and held that the use of a FLIR to monitor activity inside one's home requires a search warrant.

The comparison between the disposal of garbage and the venting of heat from a residence is a difficult one. Heat, unlike garbage which is voluntarily removed from a residence, automatically leaves a person's home without any deliberate participation by a homeowner. Even if some of the waste heat is purposefully vented to the outside, as in the *Penny-Feeney* case (which Petitioner did not do), a FLIR detects all heat leaving a residence, not just heat directed through a vent. Furthermore, when a homeowner places garbage out on a curb for pickup, the homeowner assumes the foreseeable risk that other people, that children or animals, can discover or seize whatever is in the garbage. It is an entirely different matter to say that one should expect that other people will be using a sophisticated instrument on one's home to see and detect minute gradations of "waste heat."

In addition, a person can avoid the risk of having private information discovered in one's garbage by not placing private information into the garbage in the first place, or not leaving it for pickup. On the other hand, the only way a person may avoid monitoring by the government in this case would be to turn off all heat sources in their home, even in sub-zero temperatures, or to avoid standing anywhere near an open window or any part of the house constructed with such materials as plywood, because a FLIR is even capable of revealing the presence of human forms in these circumstances.

An even more important distinction between garbage set out for collection and the images produced through infrared surveillance is what is actually being searched for by the infrared device. The only value of the so-called "waste heat" is what it discloses about the interior of the home. The infrared device produces an image of the interior of the home that otherwise is protected by the home's walls. In this sense, the infrared thermal device allows the government to intrude into the defendant's home and gather information about what occurs there. A resident has a reasonable expectation of privacy in what occurs within the home, a "location not open to visual surveillance". *U.S. v. Karo*, 468 U.S. 705, 104 S.Ct. 3296. *It is this reasonable expectation of privacy of the home that is violated by warrantless infrared surveillance, not the expectation of privacy regarding waste heat.*

The *Young* Court, citing *U.S. v. Thomas*, 757 F.2d 1359 (2nd Cir., 1985) also discussed the flawed analogy between the use of a canine sniff and the use of a FLIR:

> In *Thomas*, the Court held the use of a trained dog to sniff for narcotics outside the defendant's apartment door constituted a search that, absent a warrant, violated the Fourth Amendment.
>
> The *Thomas* court attached significance both to the method of sensory enhancement and to the fact a private residence was at issue:
>
> > With a trained dog police may obtain information about what is inside a dwelling that they could not derive from the use of their own senses. Consequently, the officers' use of a dog is not a mere improvement of their sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument. . . . Here the defendant had a legitimate expectation

> that the contents of his closed apartment would remain private, that they could not be "sensed" from outside his door . . .Because of [the] defendant['s] heightened expectation of privacy inside his dwelling, the canine sniff at his door constituted a search. As the agent had no warrant, the search violated the Fourth Amendment.

When the object of a search by the police is a private dwelling, and the means used to conduct that search reveal more than what a person may be said to knowingly expose to discovery, the protections of the Fourth Amendment should be triggered. If not triggered under these circumstances, the protections guaranteed by the Fourth Amendment have eroded to the point of extinction.

As held by this Court, when the police use sensory enhancing devices to obtain information from someone's home that could not be obtained by an unaided observation of the exterior, they must have a search warrant. *U.S. v. Karo*, *supra*. Because the police did not obtain a search warrant prior to using the FLIR to obtain information about what was occurring within Petitioner's home, the surveillance was in violation of the Fourth Amendment. As such, the fruits of that surveillance could not be used to support a finding of probable cause. Absent this illegally obtained information, there clearly was insufficient probable cause to issue the search warrant, and the fruits of the second search should have been suppressed.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Petitioner, JOSEPH PINSON, petitions this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2851

United States of America,
Appellee,

v.

Joseph Pinson,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: January 11, 1994
Filed: May 23, 1994

Before BOWMAN, Circuit Judge, and BRIGHT and ROSS, Senior Circuit Judges.

ROSS, Senior Circuit Judge.

Appellant Joseph Pinson appeals from the jury verdict finding him guilty of one count of manufacturing over 100 marijuana plants in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). On appeal, Pinson claims the government's aerial surveillance of his residence with an electronic device known as a Forward Looking Infrared Device (FLIR) constituted an illegal search in violation of his Fourth Amendment rights. Pinson also challenges the district court's[1] refusal to grant a downward departure under the "lesser harms" exception of U.S.S.G. § 5K2.11. After careful consideration of the briefs, record and arguments of the parties, we affirm both the conviction and the sentence.

---

[1] The Honorable Donald J. Stohr, United States District Judge for the Eastern District of Missouri.

I.

On July 30, 1991, pursuant to a federal search warrant, agents of the Drug Enforcement Agency (DEA) and St. Louis city police officers searched Pinson's residence, located at 2034 Knox in St. Louis, Missouri. The affidavit in support of the search warrant showed that the investigation into Pinson's activities began on June 10, 1991, when Officers Whitson and Geiger of the Missouri State Highway Patrol learned that, in February 1989, Pinson had received three United Parcel Service packages from companies that were known suppliers of indoor hydroponic growing equipment. These companies were also known to advertise in *High Times* magazine, a publication that promotes the cultivation and use of marijuana. The affidavit also showed that the DEA Task Force had subpoenaed electrical utility records for Pinson's residence, as well as for other residences in the vicinity. Those records showed that 2034 Knox had an unusually high electrical usage, which the attesting detective stated was indicative of the extra electrical lighting needed for indoor cannabis cultivation.

The affidavit also provided that based on this information, the DEA decided to use an FLIR mounted on the underside of a St. Louis County Police Department helicopter. The helicopter performed aerial surveillance of Pinson's residence on July 25, 1991, at approximately 1:20 a.m. The affidavit established that the FLIR observation revealed that the covered window on the third floor displayed an excessive amount of heat as did the roof and a skylight of the residence.

The July 30, 1991 execution of the search warrant revealed an indoor marijuana growing operation on the third floor or attic of the residence. Marijuana plants, processed marijuana, cash, miscellaneous growing equipment, and magazines and books concerning marijuana cultivation were seized from the home pursuant to the search warrant. Pinson testified that the indoor

marijuana growing operation was set up and maintained to treat his alleged asthma problems.

At the suppression hearing, Officer Patterson testified that the FLIR device provides only comparisons of surface temperatures. The device cannot actually measure temperature, but can merely compare the amount of heat radiated from various objects. Officer Patterson further testified that high intensity discharge lights, which use between four hundred and one thousand watt bulbs, are necessary for indoor marijuana growing operations. The use of these bulbs generates heat of approximately 150 degrees or more. Due to the fact that the optimum growing temperature for marijuana is between 68 and 72 degrees, the excess heat generated by the high-wattage bulbs must be vented in order to properly maintain the indoor marijuana growing operation.

On appeal, Pinson argues that the use of the FLIR to detect the heat emanating from his home without first obtaining a warrant constituted an unreasonable search and seizure in violation of the Fourth Amendment.[2] A party claiming to have suffered an unlawful invasion in violation of the Fourth Amendment must establish as a threshold matter that he had a legitimate expectation of privacy in the object searched or seized. An expectation of privacy is only reasonable where (1) the individual manifests a subjective expectation of privacy in the object of the challenged search; and (2) society is willing to recognize that subjective expectation as reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

Here, the government argues that Pinson did not have a reasonable expectation of privacy in the heat that was radiating from his house into the surrounding air space. It contends the heat-sensing device did not invade Pinson's home nor its curtilage,

[2] Pinson does not challenge the sufficiency of the affidavit on appeal and we make no determination of that issue.

nor did it emit rays into his home. Instead, according to the government, the law enforcement officers merely used the device to enhance their ability to detect variations in temperature emanating from the surface of the house.

In *United States v. Penny-Feeney*, 773 F. Supp. 220 (D. Haw. 1991), *aff'd on other grounds sub nom., United States v. Feeney*, 984 F.2d 1053 (9th Cir. 1993), the district court considered a similar challenge to a search warrant based, in large part, on evidence of heat emanations from a residence gained through the use of an infrared heat-sensing device. Like the device used in this case, the device in *Penny-Feeney* detected differences in temperature on the surface of objects being observed. Because the device "did no more than gauge and reflect the amount of heart that emanated [] from" the residence, the court held there was no intrusion into the premises and, thus, the use of the thermal detection device did not constitute a "search" under the Fourth Amendment. *Id.* at 225-26.

The *Penny-Feeney* court further held that even if defendants were capable of demonstrating a subjective expectation of privacy in the "abandoned heat" or "heat waste," there would be no Fourth Amendment violation because, as cases such as *California v. Greenwood*, 486 U.S. 35 (1988) suggest, "such an expectation [of privacy] would not be one that society would be willing to accept as objectively reasonable." *Penny-Feeney*, 773 F. Supp. at 226. In *Greenwood*, the United States Supreme Court considered whether the Fourth Amendment prohibits the warrantless search and seizure of bagged garbage left for collection outside a private residence and concluded that the defendants did not have a reasonable expectation of privacy "in the inculpatory items that they discarded." *Greenwood*, 486 U.S. at 39-41. Similarly, in this case there is no reasonable expectation of privacy in heat which Pinson voluntarily vented outside.

We also find the use of the infrared surveillance analogous to the warrantless use police dogs trained to sniff and identify the

presence of drugs. *See, e.g., United States v. Place*, 462 U.S. 696, 707 (1983) (the use of nonintrusive equipment, such as a police-trained dog, does not constitute a search for purposes of the Fourth Amendment). Just as odor escapes a compartment or building and is detected by the sense-enhancing instrument of a canine sniff, so also does heat escape a home and is detected by the sense-enhancing infrared camera.

We conclude that Pinson did not have a reasonable expectation of privacy in the heat emanated from his home. Here, the FLIR device detected the differences in surface temperature from the heat being cast off or thrown away from the house. In this way, the use of the FLIR device is analogous to the detection of odors emanating from luggage or the search of garbage left outside for collection. Any subjective expectation of privacy Pinson may have had in the heat radiated from his house is not one that society is prepared to recognize as "reasonable." The detection of the heat waste was not an intrusion into the home; no intimate details of the home were observed, and there was no intrusion upon the privacy of the individuals within. None of the interests which form the basis for the need for protection of a residence, namely the intimacy, personal autonomy and privacy associated with a home, are threatened by thermal imagery.[3]

Because Pinson failed to show that his subjective expectation of privacy is one that society finds objectively reasonable, his claim that the search warrant was issued in violation of his Fourth Amendment right is denied.

---

[3] Because we find the use of the infrared device analogous to a canine sniff or a garbage search, we are not persuaded by recent conclusions from other courts which have held that warrantless infrared surveillance violates the Fourth Amendment. *See State v. Young*, 867 P.2d 593 (Wash. 1994); *United States v. Ishmael*, 843 F. Supp. 205 (E.D. Texas 1994).

II.

Pinson also contends that the district court erred in failing to grant a downward departure under U.S.S.G. § 5K2.11, which provides that in order to avoid a perceived greater harm, "a reduced sentence may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct." However, "[w]here the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted." *Id.* Here, Pinson contends that his marijuana cultivation and use avoided the perceived greater harm of his suffering from asthma.

Pinson contends the district court abused its discretion in denying a sentence reduction on this basis because the court mistakenly construed his motion for downward departure as premised on U.S.S.G. § 5K1.1, rather than § 5K2.11. Therefore, according to Pinson, in the absence of a request for a reduction in sentence from the United States Attorney, as required by § 5K1.1, the court felt powerless to grant the motion.

The statute under which Pinson was convicted of manufacturing in excess of 100 marijuana plants provides for a mandatory minimum sentence of five years. *See* 21 U.S.C. § 841(b)(1)(B)(vii). A district court may depart below a statutory mandatory minimum only upon a motion by the government under 18 U.S.C. § 3553(e).[4] *See United States v. Rodiguez-Morales*, 958 F.2d 1441, 1445 (8th Cir.), *cert. denied*, 113 S.Ct. 375 (1992). Because there was no government motion pursuant

---

[4] 18 U.S.C. § 3553(e) provides in relevant part:

> (e) **Limited authority to impose a sentence below a statutory minimum.** — Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

to section 3553(e), the district court was without authority to depart below the mandatory minimum sentence prescribed by statute and therefore did not err in refusing to do so.

III.

Based on the foregoing, the conviction and sentence imposed by the district court are affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2851EMSL

United States of America,
Appellee,

vs.

Joseph Pinson,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

May 23, 1994

A true copy.

ATTEST:
/s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

Case Number: S1-91-282CR(8)

UNITED STATES OF AMERICA

v.

Joseph Pinson
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 71, 1987)

MURRAY STONE
Defendant's Attorney

[Filed: July 9, 1993]

THE DEFENDANT:

☐ pleaded guilty to count(s)

☒ was found guilty on count(s) 1 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section: 21:841(a)(1) and 841(b)(1)(B)

Nature of Offense: Manufacturing over 100 marijuana plants

Date Offense Concluded: 7/30/91

Count Number(s): 1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 2 and is discharged as to such count(s).

☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $50.00, for count(s) 1_____, which shall be due ☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 248-82-0823

Defendant's Date of Birth: 2/24/62

Defendant's Mailing Address: 2034 Knox Ave., St. Louis, MO 63139

Defendant's Residence Address: same as above

Date of Imposition of Sentence: 7/9/93

Signature of Judicial Officer: /s/ Donald J. Stohr

Name & Title of Judicial Officer: Donald J. Stohr, U.S. District Judge

Date: 7/9/93

Defendant: JOSEPH PINSON

Case Number: S1-91-282CR(8)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Sixty (60) months.

☒ The court makes the following recommendations to the Bureau of Prisons:

that to the extent the defendant qualifies and space is available, it is recommended that the defendant be placed in a facility that is equipped to handle defendant's medical problems.

☐ The defendant is remanded to the custody of the United States marshal.

☐ The defendant shall surrender to the United States marshal for this district,

- ☐ at a.m./p.m. on_____
- ☐ as notified by the United States marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

- ☐ before 2 p.m. on _____
- ☒ as notified by the United States marshal.
- ☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By_____
Deputy Marshal

Defendant: JOSEPH PINSON

Case Number: S1-91-282CR(8)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Four (4) years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☒ The defendant shall not possess a firearm or destructive device.

The defendant shall participate in a program of testing and treatment for substance abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: JOSEPH PINSON

Case Number: S1-91-282CR(8)

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 24

Criminal History Category: I

Imprisonment Range: 51 to 63 months. However, statutory minimum requirement of 60 months thus range is 60-63.

Supervised Release Range: 4 to 5 years

Fine Range: $10,000 to $2,000,000

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ _____

☐ Full restitution is not ordered for the following reason(s):

☒ The sentence is within the guideline range, that range does not epceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2851EMSL

United States of America,
Appellee,

vs.

Joseph Pinson,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Appellant's petition for rehearing has been considered by the Court and is denied.

June 21, 1994

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

FILED
NOV 18 1994
OFFICE OF THE CLERK

No. 94-402

In the Supreme Court of the United States

OCTOBER TERM, 1994

JOSEPH PINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
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QUESTION PRESENTED

Whether the use of a Forward Looking Infrared Device (FLIR) to detect the intensity of heat emanating from petitioner's residence constituted an unreasonable search in violation of the Fourth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-402

JOSEPH PINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 24 F.3d 1056.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1994. A petition for rehearing was denied on June 21, 1994. Pet. App. A17. The petition for a writ of certiorari was filed on August 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of manufacturing marijuana, in violation of 21 U.S.C. 841(a)(1). Pet. App. A1. He was sentenced to 60 months' imprisonment, to be followed by four years of supervised release. *Id.* at A9-A16.

1. In June 1991, law enforcement officers began an investigation of petitioner after learning that he had received three packages from companies that supplied hydroponic growing equipment, which is often used to grow marijuana indoors. The companies were known to advertise the equipment in a magazine that promotes the cultivation and use of marijuana. The officers also learned from electrical utility records that petitioner's residence had an unusually high electrical usage, which was consistent with the high amount of electricity needed to power the lights, pumps, timers, fans, and other equipment used to grow marijuana indoors. Pet. App. A2; Gov't C.A. Br. 1-2, A7-A8.

Based on their past experience, the officers knew that indoor cultivation of marijuana requires high intensity discharge lights, which use 400 to 1000 watt bulbs. Such lights generate heat of 150 degrees or more. Since the optimum temperature for growing marijuana is between 68 and 72 degrees, the excess heat generated by the high intensity discharge lights must be vented in order to maintain an indoor marijuana growing operation. Pet. App. A3; Gov't C.A. Br. 2-3.

On July 25, 1991, the officers conducted aerial surveillance of petitioner's residence. A Forward Looking Infrared (FLIR) device was mounted on the underside of the officers' helicopter. The FLIR device is a thermal imaging device that detects differences

between the amounts of heat emitted from various surfaces. The differences in surface temperature are displayed on a monitor as shades ranging from black or dark grey when an object emits little heat to white when an object emits intense heat. The FLIR showed that the roof, skylight, and a covered window of petitioner's residence emitted an excessive amount of heat in comparison to the surrounding houses. Pet. App. A2-A3; Gov't C.A. Br. 3-4.

Shortly thereafter, the officers obtained a search warrant for petitioner's residence. When they executed the warrant, the officers found an indoor marijuana growing operation on the third floor or attic of the residence. The officers seized over 100 marijuana plants, processed marijuana, cash, miscellaneous growing equipment, and magazines and books concerning marijuana cultivation. Pet. App. A2; Gov't C.A. Br. 4-5.

2. Petitioner filed a motion to suppress the evidence seized pursuant to the search warrant. He argued that the aerial FLIR surveillance of his residence constituted an illegal search under the Fourth Amendment. He further argued that the affidavit supporting the search warrant lacked probable cause in the absence of the results of the FLIR surveillance. The district court denied the motion. Pet. 3; Gov't C.A. Br. B1-B12.

3. The court of appeals affirmed. Pet. App. A1-A7. It held that use of the FLIR device did not constitute a search under the Fourth Amendment because petitioner did not have a legitimate expectation of privacy in the heat emitted from his residence. *Id.* at A3-A5. The court explained that "[a]n expectation of privacy is only reasonable where (1) the individual manifests a subjective expectation of privacy in the object of the challenged search; and (2) society is willing to recognize that subjective expectation as reasonable." *Id.* at A3 (citing

Katz v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). The court found that "the use of the FLIR device is analogous to the detection of odors emanating from luggage or the search of garbage left outside for collection." Pet. App. A5. In addition, the court noted that "[t]he detection of the heat waste was not an intrusion into the home; no intimate details of the home were observed, and there was no intrusion upon the privacy of the individuals within." *Ibid.* The court thus concluded that "[n]one of the interests which form the basis for the need for protection of a residence, namely the intimacy, personal autonomy and privacy associated with a home, are threatened by thermal imagery." *Ibid.* The court therefore ruled that "[a]ny subjective expectation of privacy [petitioner] may have had in the heat radiated from his house is not one that society is prepared to recognize as 'reasonable.'" *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 4-10) that the court of appeals erred in holding that the use of the FLIR device during the aerial surveillance of his residence did not constitute an unreasonable search under the Fourth Amendment. That claim lacks merit.

This Court employs a two-part test to determine whether an individual has a constitutionally protected expectation of privacy in an object or location: "first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" *California* v. *Ciraolo*, 476 U.S. 207, 211 (1986); see also *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). In *Ciraolo*, the Court held that a police overflight of a private residence did not require a warrant. The Court concluded that an

individual had no reasonable expectation of privacy in an area (the backyard of his home) that was visible to the naked eye from an aircraft in navigable airspace. 476 U.S. at 212-214; see also *Florida* v. *Riley*, 488 U.S. 445, 449-452 (1989) (plurality opinion). In *Dow Chemical Co.* v. *United States*, 476 U.S. 227, 234-239 (1986), the Court similarly held that the use of an aerial mapping camera to photograph an industrial manufacturing complex from navigable airspace did not require a warrant.

In this case, the court of appeals properly concluded that petitioner had no legitimate expectation of privacy in the level of heat emitted from his residence. As the court of appeals correctly explained, "[t]he detection of the heat waste was not an intrusion into the home; no intimate details of the home were observed, and there was no intrusion upon the privacy of the individuals within." Pet. App. A5. Because "[n]one of the interests which form the basis for the need for protection of a residence, namely the intimacy, personal autonomy and privacy associated with a home, are threatened by thermal imagery[,]" the court of appeals correctly concluded that "[a]ny subjective expectation of privacy [petitioner] may have had in the heat radiated from his house is not one that society is prepared to recognize as 'reasonable.'" *Ibid.*

In *Dow Chemical*, this Court acknowledged that "surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant." 476 U.S. at 238. The Court went on to explain, however, that

> the photographs here are not so revealing of intimate details as to raise constitutional concerns. Although

> they undoubtedly give EPA more detailed information than naked-eye views, they remain limited to an outline of the facility's buildings and equipment. The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems. An electronic device to penetrate walls or windows so as to hear and record confidential discussions of chemical formulae or other trade secrets would raise very different and far more serious questions.

476 U.S. at 238-239. The Court thus focused on the potential of a particular surveillance technique to reveal information that is genuinely private.

Although petitioner asserts (Pet. 5) that the FLIR device produces what amounts to an x-ray photograph, the thermal imaging technique is more nearly comparable to conventional photography. While conventional photography records the image of an object based on the object's emission of radiation from the visible portion of the electromagnetic spectrum, thermal imaging simply records images based on the object's emissions from the infrared portion of the electromagnetic spectrum. Quite unlike x-ray photography, thermal imaging merely produces a picture of the surface temperature of the exterior of an object—such as the roof and outside walls of petitioner's residence—based on the radiation that object emits.[1] Thus, the picture produced by thermal

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[1] At the suppression hearing, the Drug Enforcement Agency (DEA) agent who conducted the surveillance testified that the FLIR device indicated that petitioner's residence was emitting an excessive amount of heat because, when viewed on the monitor, areas of petitioner's residence appeared white while the roofs of the surrounding houses appeared black. Gov't C.A. Br. 3-4. Because the information obtained by the FLIR device is derived

imaging is no more intrusive than the enhanced aerial photographs that were limited to an outline of the buildings in *Dow Chemical*. Because the FLIR device did not penetrate the walls or otherwise reveal what was occurring within the residence, its use did not "infringe[] upon the personal and societal values protected by the Fourth Amendment." *Ciraolo*, 476 U.S. at 212.[2] The court of appeals therefore correctly held that "[a]ny subjective expectation of privacy [petitioner] may have had in the heat radiated from his house is not one that society is prepared to recognize as 'reasonable.'" Pet. App. A5.

2. The court of appeals' decision is consistent with that of the only other court of appeals that has squarely addressed the issue. Like the court of appeals here, the Eleventh Circuit in *United States* v. *Ford*, 34 F.3d 992, 995-997 (1994), held that the use of a thermal imaging device to detect heat emanating from a mobile home did not constitute an unreasonable search. The court explained that "[l]ike the aerial photography in *Dow*, the thermal imagery at issue here appears to be of such low resolution as to render it incapable of revealing the

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from exterior images of a building (or other object), petitioner's reliance (Pet. 9-10) on *United States* v. *Karo*, 468 U.S. 705 (1984), is misplaced. That case involved monitoring of a beeper inside a residence, "a location not open to visual surveillance." *Id.* at 714.

[2] Indeed, the use of the FLIR device in this case was no more intrusive than the warrantless use of a trained drug detection dog to sniff luggage in a public place that was upheld in *United States* v. *Place*, 462 U.S. 696, 707 (1983). As the court of appeals observed, "[j]ust as odor escapes a compartment or building and is detected by the sense-enhancing instrument of a canine sniff, so also does heat escape a home and is detected by the sense-enhancing infrared camera." Pet. App. A5.

intimacy of detail and activity protected by the Fourth Amendment." 34 F.3d at 996.

In *United States* v. *Kyllo*, No. 93-30231 (Oct. 4, 1994), slip op. 12,076-12,077, aff'g in part and remanding 809 F. Supp. 787 (D. Or. 1992), the Ninth Circuit recently found that the record was insufficiently developed to determine whether the use of a thermal imaging device to scan the defendant's residence constituted a search. The Ninth Circuit remanded for an evidentiary hearing on the technological capacities of the thermal imaging device used in that case. That decision thus does not constitute a definitive holding on the question presented here. There is, therefore, no conflict that would warrant this Court's review.[3]

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[3] The majority of district courts to consider the issue have held that the warrantless use of a thermal imaging device does not constitute an unreasonable search. See *United States* v. *Domitrovich*, 852 F. Supp. 1460, 1472-1475 (E.D. Wash. 1994); *United States* v. *Porco*, 842 F. Supp. 1393, 1395-1398 (D. Wyo. 1994); *United States* v. *Penny-Feeney*, 773 F. Supp. 220, 225-228 (D. Haw. 1991), aff'd on other grounds *sub nom. United States* v. *Feeney*, 984 F.2d 1053 (9th Cir. 1993). Two district courts have reached a contrary conclusion. See *United States* v. *Field*, 855 F. Supp. 1518, 1525-1533 (W.D. Wis. 1994); *United States* v. *Ishmael*, 843 F. Supp. 205, 209-213 (E.D. Tex. 1994). We note that the government's appeal of the district court's ruling in *Ishmael* is pending.

As petitioner points out (Pet. 7-8), the Washington Supreme Court held in *State* v. *Young*, 867 P.2d 593, 595-601 (1994), that the use of a thermal imaging device to detect heat radiated from the defendant's home violated the state constitution. The court went on to conclude that the use of the thermal imaging device also violated the Fourth Amendment. 867 P.2d at 601-604. The court acknowledged, however, that it "need not reach the issue of whether infrared surveillance of defendant's home violates the [Fourth Amendment] since we find that it violates [the state constitution]." *Id.* at 601. Thus, the court's discussion of the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

NOVEMBER 1994

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federal constitutional question was dicta. Compare *State* v. *McKee*, 510 N.W.2d 807 (Wis. Ct. App. 1993) (holding that use of thermal imager to scan the defendant's home did not violate the Fourth Amendment), review denied, 515 N.W.2d 715 (Wis. 1994) (Table).